In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-518

JASPER M. BRANCATO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, the former owners of a Ramada Inn, contend that the motel business records that they had left at the motel after its sale could not properly be subpoenaed from the subsequent owners by a federal grand jury.

Following a hearing in the United States District Court for the Western District of Missouri, the trial court ordered the return and suppression of some 42 boxes of business records that the government had received pursuant to a subpoena *duces tecum* (Pet. App. A 17-23). The court of appeals reversed (*In re Grand Jury Proceedings*, 520 F.2d 904; Pet. App. B 24-30).

1. The relevant facts are essentially undisputed. On July 6, 1973, petitioners sold the Ramada Inn in Kansas

City, Missouri, to Griffin Inns, Inc. (T. 6).[1] The agreement of sale contained, *inter alia*, the following provisions (520 F.2d at 905-906; Pet. App. B 25-26):

* * *

2. *DESCRIPTION OF PROPERTY.* The property being purchased is the land and buildings and other improvements thereon commonly known and designated as Ramada Inn, 5000-5100 East Linwood, Kansas City, Missouri 64128, hereinafter referred to as the 'Property'. The Property includes:

* * *

D. Complete copies of all customer lists available and business records prepared, accumulated or compiled by Sellers and/or any operating company retained by the Sellers (hereinafter called 'Operating Company') in the management and operation of the Property * * *.

* * *

5. *CLOSING.* * * * Sellers shall execute and deliver to Purchaser the following, which shall be in form and substance satisfactory to counsel for the Purchaser:

* * *

C. Copies of all customer lists and business records, and an assignment of all licenses, rights and permits (held by Sellers which may lawfully be transferred to Purchaser) necessary or appropriate for the operation of the Property, all as described in Section 2D hereof * * *.

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[1] "T." refers to the transcript of the suppression hearing on December 5, 1973.

Pursuant to this agreement, the 42 boxes of documents, which consisted of guest registration cards and billing records from 1968 to 1972, remained at the Ramada Inn after the sale, where they were kept in a locked linen closet along with other motel records (T. 9-11). The only persons with keys to the closet were the general manager and housekeeper of the motel (T. 10).

On October 7, 1973, in connection with an ongoing criminal tax investigation, a grand jury subpoena *duces tecum* was served on the manager of the motel, directing him to produce "all business records of the Ramada Inn, 5000 East Linwood, within your possession, custody or control, which reflect the income and expenses of said business enterprise" for the previous five years. The manager elected to comply with the subpoena by permitting Internal Revenue Service agents to remove the records (T. 27-31, 40-43). Thereafter, alleging that they were still the owners of the subpoenaed property, petitioners moved for its return, claiming that the records had been seized in violation of the Fourth and Fifth Amendments to the Constitution. Relying primarily upon *Schwimmer* v. *United States*, 232 F.2d 855 (C.A. 8), the district court concluded that the written agreements of sale "establish as a matter of fact and law that the [petitioners] owned individually the 42 (rather than 41) boxes of documents seized under the grand jury subpoena (Pet. App. A 18) and that the records had therefore been unlawfully taken by the government.

2. The court of appeals properly reversed the ruling of the district court, since this case is directly governed by *Couch* v. *United States*, 409 U.S. 322, where the Court held that a taxpayer may not invoke the Fourth or Fifth Amendment to prevent the production of his business and tax records in the possession of his accountant. *A fortiori*, petitioners may not prevent the production of the business

records of a motel that are in the exclusive custody and control of the successor owners of that business. Here, as in *Couch*, "the ingredient of personal compulsion against an accused is lacking," 409 U.S. at 329, and there is "no 'shadow of testimonial compulsion upon or enforced communication by the accused.'" *Ibid.*

While the Court in *Couch* recognized the possibility that "situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact," 409 U.S. at 333, this is not such a situation. Since petitioners had sold the business and the right to copies of the motel's records to Griffin Inns, Inc., and then left the records in Griffin's sole custody and control, there was no "mere fleeting divestment of possession." 409 U.S. at 334. Moreover, the very nature of the documents in question—past customer and billing records of the motel—indicates that neither the petitioners nor the successor owners intended merely a temporary bailment of the records until petitioners could remove them.

3. Contrary to petitioners' contentions, the decision below does not conflict with either *United States* v. *Guterma*, 272 F.2d 344 (C.A. 2), or *Schwimmer, supra*. In *Schwimmer*, the recipient of the subpoena was nothing more than a custodian of the subpoenaed records. Here, by contrast, as the court of appeals noted in distinguishing its prior decision, "the corporation upon whom the subpoena was served had an absolute right to possession of, at least, copies, if not the originals, of the documents which were the subjects of the subpoena. The contract between the parties can be interpreted in no other manner"

(*In re Grand Jury Proceedings, supra,* 520 F.2d at 906; Pet. App. B 27).[2]

Similarly, in *Guterma,* the corporation in whose offices a safe containing the defendants' records was stored did not have access to the subpoenaed records, since only the defendant and his co-defendant knew the combination to the safe. In this case, the motel owners, not petitioners, had unfettered access to the records and, indeed, had exclusive access. Thus, neither *Schwimmer* nor *Guterma* is apposite and the court of appeals correctly followed the holding of *Couch*: "no Fourth or Fifth Amendment claim can prevail where * * * there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused." 409 U.S. at 336.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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[2]Petitioners' claim (Pet. 15) that the court of appeals improperly made findings of fact different than those of the district court is without merit. The interpretation of written agreements is generally a conclusion of law rather than a finding of fact and, as such, the district court's determination in this regard was entitled to no special deference. See, *e.g., Dingman* v. *United States,* 429 F.2d 70 (C.A. 8). Moreover, petitioners' references (Pet. 15) to an "oral modification of that contract" and to the credibility of witnesses is puzzling. The district court did not rely upon any oral modification in reaching its conclusion on ownership; instead, the court referred explicitly to the "carefully drawn written agreements" in holding that the petitioners owned the records in question (Pet. App. A 18). In addition, petitioners made no claim of "oral modification" before the court of appeals. In any event, *Couch* establishes that considerations of ownership do not control the determination. 409 U.S. at 332-333.